IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. _____

UNITED STATES OF AMERICA,

Respondent,

vs.

JOSEPH DIPPOLITO,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeal for the Ninth Circuit, approving a judgment of the United States District Court for the Central District of California finding Petitioner guilty of perjury.

OPINION BELOW

The District Court rendered no written opinion. The opinion of the Court of Appeal is unreported. It is set out in the Appendix, infra.

JURISDICTION

1. The date of the judgment sought to be reviewed and the time of its entry is November 13, 1970.

2. No rehearing has been requested nor any extension of time sought within which to petition for certiorari.

3. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 United States Code, 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does a witness, subpoenaed by a grand jury and who may or could be a defendant in the matter under investigation, have a constitutional right to counsel at his side during

his interrogation before the grand jury?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> "No person . . . shall be compelled in any case to be a witness against himself."

Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

STATEMENT OF THE CASE

I

BASIS FOR FEDERAL JURISDICTION IN THE FIRST INSTANCE

The District Court exercised jurisdiction under 18 United States Code, 1621.

Facts

Petitioner was subpoenaed to testify on May 16, 1968, before a federal grand jury. He appeared before the said grand jury with his then counsel.

As the proceedings opened the following colloquy occurred:

> "Mr. Swing (Attorney for Petitioner): I am counsel for Mr. Dippolito. He requests that I be present. I am present, and I do request to remain.
>
> "Mr. Velman (Assistant United States Attorney): I am sorry, Mr. Swing, but under the Federal Rules of Criminal Procedure only the witness is allowed to be present. The request is denied.
>
> "Mr. Swing: All right, that's on the record.
>
> "Mr. Velman: Yes Sir."
>
> [Transcript of Proceedings had before the Federal Grand Jury, Los Angeles, California, Thursday, May 16, 1968.]

Petitioner then proceeded to testify before the grand jury after being advised that the grand jury was conducting an investigation of possible

violations of Federal law, including Section 371 of Title 18 of the United States Code, conspiracy; Section 5691 of Title 26 of the United States Code, carrying on the business of a retail liquor dealer and failing to pay the special tax imposed by the Internal Revenue laws, as well as other possible violation of the Federal law.

He was advised of his right to refuse to testify under the Fifth Amendment of the United States Constitution and of the penalties of perjury.

Subsequently, on January 30, 1969, the grand jury returned an indictment charging Petitioner in three counts of perjury, in violation of 18 United States Code, 1621. He was, after trial by jury, in the United States District Court for the Central District of California, found guilty of two counts (C. T. 23) under the indictment. He has been sentenced to imprisonment for a period of five years on each of the two counts, and the sentences are to run consecutively.

Notice of Appeal was filed (C. T. 4). On Appeal, the court below affirmed the decision of the trial court [Appendix A].

II

REASONS FOR GRANTING THE WRIT AND ARGUMENTS AMPLIFYING SAME

This case presents an issue as to whether the denial of the Petitioner's request to have his attorney present during his interrogation by the grand jury was not an abrogation of his rights to individual liberties and his constitutional guarantee of due process.

It is Hornbook law that the privilege against self-incrimination extends to all judicial or official hearings where persons may be called upon to give testimony, even to civil proceedings. Griswold, the Fifth Amendment Today, (1966); Morgan, Basic Problems of Evidence, 145-158 (1962).

If it is clear that the privilege applies in investigations by a grand jury, it is no less clear that an untrained layman is ill equipped to ascertain when he may claim the privilege and when his answer would support a conviction or "furnish a link in the chain of evidence needed to prosecute the claimant for a crime." Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 914.

Thus the problem facing the witness before a grand jury and who is there without the presence of his attorney and where he will have to shift for himself is one full of peril. The admissions

of a party before a grand jury are admissible against himself or may be used to impeach his testimony and certainly and most clearly may result in an indictment for perjury or contempt.

This court has clearly recognized the need for assistance of counsel by one suspected or accused of a crime in the landmark case of Escobedo v. Illinois, 378 U.S. 478, 486 (1964), and the same must be said of the need for counsel before the grand jury. The court said:

> "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation. Powell v. Alabama, 277 U.S. 45-69 (1932) . . . . What happened at this interrogation could certainly 'affect the whole trial.' Hamilton v. Alabama, 368 U.S. 52-54 (1961) . . ."

The facts of the Escobedo case are instructive in that they make it plain that the precepts of the case are not satisfied simply by giving a client some general advice and then letting him "go it alone." Prior to the police interrogation which produced his damaging admission, Escobedo had had the benefit of counsel. The Escobedo court conceded that,

> "There is testimony in the record that petitioner and his lawyer had previously discussed what petitioner should do in the event of interrogation."

We submit that counsel, in advising his client how to react in the face of possible future interrogation, can never anticipate every possible question and every conceivable accusation that may be put to his client. The argument then, reduces itself to the proposition that not only should a defendant be made aware of his rights, but that he is entitled to be advised at every step of the interrogation concerning whether or not to respond and how to respond. The mere presence of counsel outside the grand jury room and away from the proceedings does not guarantee this right because the witness before the grand jury may not accurately and adequately repeat the questions being asked him and unless the witness were to leave the grand jury room after every question, the overall context of the grand jury inquiry certainly would be lost to counsel outside the room.

The very facts of Escobedo negate the usual contention of the prosecution that general advice by counsel is an adequate substitute for his continued presence. So also does the language of this court in Massiah v. United States, 377 U.S. 201 (1964), wherein the court denounced incriminating statements which had been obtained from Massiah in the absence of counsel after he had been indicted.

Usually, the prime suspect in a crime of violence is taken to the police station for

interrogation. Much more frequently, the prime suspect of a "white collar crime," such as mail fraud or tax evasion, is called before the grand jury. Thus requiring counsel for a "suspect" in the grand jury room hardly constitutes a radical extension of Escobedo. The logic of Escobedo would seem to require application of its safeguards to grand jury and other investigatory proceedings, whose purposes are to determine possible guilt. Before the grand jury the witness' privilege is more complicated than in police interrogations, for he can legally be compelled to answer non-incriminatory questions and will be held to have waived his privilege if he answers incriminatory ones. As dissenting Justice Black, joined by Frrankfurter and Douglas, JJ., pointed out in Rogers v. United States, 378 U.S. at 486:

> " * * * [T]oday's holding creates this dilemma for witnesses [before a grand jury]: On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it."

If, as Justice Frankfurter put it in Griffin v. Illinois, 351 U.S. 12, 23 (1956), "Law addresses itself to actualities," counsel should be allowed in the grand jury room. Resolution of

the scope of the privilege against self-incrimination and the applicability of the waiver doctrine on a question by question basis raises issues which are difficult and complex. Recognizing the traditional approach of the grand jury, it is nonetheless difficult to reconcile that procedure with the Fifth Amendment guarantee that "No person shall be compelled in any criminal case to be a witness against himself." Like a trial, a grand jury investigation of a crime is "a criminal case" at which incriminating questions need not be answered. Councilman v. Hitchcock, 142 U.S. 547 (1892). At a trial, putting the accused on the witness stand without his consent and asking him anything at all would violate his constitutional privilege against self-incrimination. Mere interrogation before a grand jury may harm the accused as much as mere interrogation at a trial. His manner and voice may arouse suspicion. If he refuses to testify at all, or to answer some questions on the ground that answers might incriminate him, the grand jury may draw conclusions. If he refuses to answer questions that are not incriminating, he may be guilty of contempt.

Petitioner was advised that he was a potential defendant when he was brought before the grand jury and thus that body, in the language of Escobedo, had "begun to focus on a particular suspect." While not yet in custody, the criminal process had been initiated. Petitioner did not have a right to refuse to ignore the subpoena to appear before the grand jury. An arrestee can

only be subjected to questioning; he cannot lawfully be made to answer. A witness before a grand jury, is required to testify or be found in contempt. He must weigh every question and exercise his judgment with respect to whether the particular question warrants his exercise of the privilege. A flat warning to remain silent in the grand jury room cannot suffice to protect his rights. If the continued presence and constant advice of counsel is needed to effectuate the privilege against self-incrimination in the interrogation room, it obviously is necessary in the grand jury room.

Petitioner asked for such assistance and it was denied.

While it is true that this court has spoken many times on this subject in the past, the Petitioner respectfully submits that recent developments in the right to counsel privilege against self-incrimination have become so momentous and so striking in the last few years that this question should be reconsidered by this court.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,
DWAIN CLARK
Attorney for Petitioner

APPENDIX A

[Opinion of the United States Court of Appeals for the Ninth Circuit, filed November 13, 1970, William B. Luck, Clerk]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 24,965
	)	
vs.	)	
	)	
JOSEPH DIPPOLITO,	)	
	)	
Defendant-Appellant.	)	
	)	

On appeal from the United States District Court for the Central Distirct of California

Before: BARNES and DUNIWAY, Circuit Judges, and CROCKER,* District Judge

*Honorable M. D. Crocker, United States District Judge, Eastern District of California, sitting by designation.

CROCKER, District Judge:

Appellant was convicted of two counts of perjury before a duly impaneled and sworn Grand Jury in the Central District of California in violation of 18 U.S.C. § 1621. The appellant testified before the Grand Jury while it was conducting an investigation of possible violations of revenue laws of the United States for concealed ownership of a liquor store in Ontario, California.

The liquor license of the store was issued to appellant's father on the express condition that the appellant not own or acquire any interest in the business, that he take no part in the operation of the business, or in any way exercise the privilege of the license. The father subsequently died. Under his will the store was devised to appellant with the provision that in the event the liquor license was not transferable, or the appellant did not desire to operate the store, it could be sold by the executors and the proceeds distributed to the appellant.

Appellant's sister was appointed executrix of the father's estate and the liquor license was issued to her with the same prohibitory condition regarding the appellant included therewith. Subsequently, for a period of approximately seven years the estate was held open and the store operated. The Grand Jury investigation was instituted for the stated purpose of determining who actually was exercising ownership of the store by virtue of managing and operating it. The exercise of ownership by someone other than

the executrix would indicate the possibility of violations of revenue statutes of the United States.

On appeal to this court the appellant first argues that the testimony which was the subject of the indictment was not material to any matter within the jurisdiction of the Grand Jury. It is contended that appellant's relationship with respect to the store was clearly defined under the provisions of the will and the liquor license. Unless the California Alcoholic Beverage Control Board relented on the liquor license, appellant would continue to be bound under the prohibitory provision. The executrix was obligated by law to operate the store for the benefit of decedent's estate until closing at which time the proceeds from the sale of the store would be distributed to appellant as beneficiary under the will. If, however, the prohibitory clause of the liquor license were deleted, at closing the appellant could either elect to take the store itself, or the proceeds from the sale of the store.

Appellant argues that since the foregoing was a matter of public record, inquiry seeking to establish that he "worked" at or "managed" the store was completely immaterial to the announced statutory purpose of the inquiry (i. e., to determine if ownership of the store was being concealed so as to violate federal law). It is urged that the questions asked were material only as to whether or not there had been a violation

of the prohibition contained in the liquor license.

We do not believe the question of materiality presented here can be so narrowly construed. The court below ruled as a matter of law that the questions asked were material to the investigation. In prosecution for perjury before a Grand Jury the test of materiality which has been employed is whether the false testimony has a natural tendency to influence the Grand Jury in its investigation. Woolley v. United States, 97 F. 2d 258, 262 (9th Cir. 1938); Vitello v. United States, 425 F. 2d 416, 424 (9th Cir. 1970).

While the public record disclosed a documentary relationship between appellant and the store, it is obvious that such could have been a facade behind which a different relationship actually existed. This being a possibility, there could have been violations of federal revenue laws in the arrangement. Appellant's false testimony in response to questions regarding this arrangement would surely influence the Grand Jury in its investigation. Therefore, the test for materiality is met. It is of no consequence whether or not concealed ownership was eventually established by the investigation. See, Blair v. United States, 250 U.S. 273, 282 (1919); Carter v. United States, 417 F. 2d 384, 386 (9th Cir. 1969).

Appellant's next contention is that the evidence is insufficient to sustain the judgment of conviction. He was convicted of perjury on counts one and three of the indictment. This

allegation is based largely on the fact that the indictment does not make reference to the whole of appellant's testimony before the Grand Jury. The appellant maintains that qualifying language contained in his testimony, but not reported in the indictment, made clear that he was, at least, confused and that the testimony was not intended to contain misstatements of fact.

On appeal, the sufficiency of the evidence must be tested in a light most favorable to the Government. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Amaro, 422 F. 2d 1078, 1081 (9th Cir. 1970). Since appellant does not challenge the substance of the evidence produced at trial but merely its interpretation, no problem of corroboration of the evidence is presented here. See, Arena v. United States, 226 F. 2d 227 (9th Cir. 1955); Gebhard v. United States, 422 F. 2d 281 (9th Cir. 1970). We believe that the evidence is clearly sufficient to support the conviction on both counts of the indictment.

Count one involved appellant's negative responses to inquiries as to whether he participated in the management of the store. There may be some indication of hesitance on his part in the testimony. However, it is clear that he intended to indicate that he did not participate in the management of the store. Furthermore, there is no evidence that he was confused. He was advised of the nature of the proceedings and the purpose of the investigation prior to his being questioned. His attorney was

present to assist him. His answers were direct and there is no evidence that he suffered from a defect of capacity.

The evidence of his participation in management is substantial. Although he denied having anything to do with the books and records of the store, he in fact had made out, but had not signed, 672 checks on the account of the store over a period of seven years. Evidence was also produced which showed that on several occasions he had engaged in negotiations on behalf of the store. He had also delivered the records of the store along with his own records to their mutual accountant. Finally, on several occasions the accountant had directed him to make out checks on behalf of the store and he did so.

Count three relates to the portion of his testimony concerning whether or not he worked in the store. The thrust of his answers was to the effect that he very rarely worked behind the counter in the store and then only briefly when the regular employees were momentarily indisposed. There is no qualifying language indicating any greater participation than this. The Government produced seven agents at trial who testified that one or more of them had placed appellant under surveillance on nine separate occasions. Appellant was observed opening the store in the morning and waiting on customers from behind the counter. There were no other employees apparent in the store. In each instance the agents entered the store,

made a purchase from appellant, and obtained his fingerprints on the item purchased.

Appellant's final allegation is that the purpose for calling him before the Grand Jury was to entrap him so as to establish a case of perjury against him. This defense was not raised at trial. Furthermore, we do not find support for the allegation in the record.

The judgment is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1099

JOSEPH DIPPOLITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on two counts of perjury before a federal grand jury, in violation of 18 U.S.C. 1621. He was sentenced to consecutive prison terms of five years. The court of appeals affirmed (Pet. App. A).

The sole contention here is that he was entitled to have his attorney present with him inside the grand jury room notwithstanding the contrary provisions of Rule 6(d), F.R.Crim.P. This contention was not made to or considered by the court below. It is admitted that petitioner's counsel was present to assist him outside the grand jury room and that petitioner was

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advised of his rights not to testify or incriminate himself, as well as of the penalties for perjury.

Petitioner's proposition has never been accepted by this or any other federal appellate court. See *Hannah* v. *Larche*, 363 U.S. 420, 497–499 (Douglas, J. dissenting); *United States* v. *Levinson*, 405 F. 2d 971, 979–980 (C.A. 6), certiorari denied *sub nom. Strang* v. *United States*, 395 U.S. 906. An appearance before a grand jury cannot, as petitioner urges, be deemed equivalent to custodial interrogation to which the decision in *Escobedo* v. *Illinois*, 378 U.S. 478, was directed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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